UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

STAY THE COURSE WEST VIRGINIA, a West Virginia unaffiliated independent expenditure political action committee; **DAVID BAILEY**, in his capacity as Chairman and Treasurer of Stay the Course West Virginia; **PINEVILLE LUMBER, INC.**, a West Virginia Corporation; and **THOMAS STEPHEN BAILEY**,

Plaintiffs,

v. **Case No. 1:12-cv-1658**

NATALIE E. TENNANT, in her official capacity as West Virginia Secretary of State and member of the West Virginia State Election Commission; and **SCOTT ASH**, in his official capacity as Prosecuting Attorney for Mercer County, West Virginia, as a representative of the class of all West Virginia Prosecuting Attorneys,

Defendants.

MEMORANDUM OF NATALIE E. TENNANT,
WEST VIRGINIA SECRETARY OF STATE,
IN OPPOSITION TO PRELIMINARY INJUNCTION

Introduction

In 2004, the people of West Virginia were drawn into a series of events that highlighted the problems of independent election financing and that brought the state to national attention for the prominent appearance of impropriety in its government. An independent political action committee received huge amounts of contributions from one source, identified as the chairman and principal officer of A.T. Massey, Inc, a company that was anticipated to appear before the

West Virginia Supreme Court of Appeals in litigation involving more than $50 million dollars. The political action committee receiving these contributions used them to fund a negative, statewide advertising campaign targeted against an incumbent justice who was facing re-election. This advertising fusillade was not conducted at the request, or with the cooperation, of the election campaign of the challenging candidate.

When the election results were tallied, the incumbent justice had lost and the challenger, Brent Benjamin, took the bench. Eventually, the A.T. Massey litigation came before the West Virginia Supreme Court and the question arose as to whether Justice Benjamin should be recused from consideration of the case. Journalists on national television and in national publications cited these circumstances as an example of the gross improprieties that flow from the use of money to effect the outcome of elections and, subsequently, the processes of government itself.

Although Justice Benjamin reviewed his position according to judicial precedents and concluded that he had no actual bias in the matter, the United States Supreme Court determined that the circumstances of this election created a "constitutionality intolerable probability of actual bias" such that the litigants in the case could not receive fair review by an impartial judicial authority. *Caperton v. A.T. Massey, Inc.*, 556 U.S. 868, 129 S.Ct. 2252, (2009).

In response, in part, to this series of events, the people of West Virginia, through their elected, representative Legislature, enacted changes to the State's laws regarding the funding of political action committees engaged in political expenditures made independently of the campaigns of individual candidates. In doing so, the West Virginia Legislature amended WEST VIRGINIA CODE §3-8-12 to include a uniform limit on the amount of money or other thing of value that a person may contribute to any person "engaged in furthering, advancing, supporting or aiding in the nomination or election of any person" for any state or local office. The Legislature also set out an extensive list of its findings for enacting this legislation in W. VA. CODE §3-8-1(a), including the following:

> " * * *
>
> (8)The regulation of the various types of non-broadcast media in addition to broadcast media, is tailored to meet the circumstances found in the State of West Virginia.
>
> * * *
>
> (13) In West Virginia, contributions up to the amounts specified in this article allow contributors to express their opinions, level of support and their affiliations."

In disregard of these facts and circumstances, the Plaintiffs now seek to have this Court overrule the will of the people of West Virginia and invalidate the West Virginia Legislature's balanced and content-neutral approach to prevent the pervasive appearance of corruption and improper influence in state and local offices.

Standards for a Temporary Injunction

When all relevant factors are taken into consideration, the Plaintiffs cannot demonstrate and prove the requisite elements to justify the grant of a temporary injunction. A temporary injunction is an extraordinary remedy and should only be granted when the moving party makes a clear showing that the injunction would prevent a tangible, permanent injury to that party, when balanced against the relative harm to the opposing parties, and the effect upon the public interest. The moving party must also clearly demonstrate that it is likely to prevail upon a trial of its underlying claims. In this case, though, there are substantial public interests involved which, when considered in balance, do not support the Plaintiff's position and this case presents novel issues of fact, as well as issues of law, which do not suggest the clear result that the Plaintiffs claim.

A. Irreparable Harm to the Plaintiffs.

The law that is the subject of this litigation regulates the contributions of money or "other thing of value," rather than the expenditure of moneys received as contributions. In *Buckley v. Valeo*, 242 U.S. 1, 96 S. Ct. 612, (1976), the United States Supreme Court held that, although contribution limits may encroach upon First Amendment interests, they do not encroach upon those interests to the same degree as limits upon expenditures. When the government attempts to regulate the financing of political campaigns and election advocacy through contribution limits, it must have a countervailing interest that outweighs the burden upon the exercise of First Amendment rights, *SpeechNow.org v. FEC*, 599 F. 3d 686, 692 (D.C. Cir. 2010). Federal case law acknowledges that a claim of a burden upon the exercise of free speech is not absolute. The West Virginia law does not block the Plaintiffs's ability to show support for, or opposition to, one or more candidates in the upcoming election. Under the law they may contribute to the cause of the Stay the Course West Virginia political action committee and the committee may solicit contributions. The Plaintiffs merely may not contribute, or solicit contributions, in a manner that is will create a probability of improper bias and corruption in the public offices that are the subject of the committee's campaigns.

B. Irreparable Harm to Those Defendant Must Represent.

The Defendant, Natalie Tennant, is an elected official with a duty to faithfully carry out the laws of the State of West Virginia. If a law, or laws, administered by her are found to be unconstitutional, then, it is true, there is no direct harm to her or to her office. However, when there is a challenge to a law, which has been enacted in the due course of the proceedings of the representative, legislative body of the people, the Defendant has a duty to respect and defend that same law upon the presumption the law is constitutional.

Insofar as the people of West Virginia have sought to prevent the corruption and the appearance of corruption that can flow from the way that items of value are provided for the benefit of candidates for elective office, the Defendant stands in the place of those people and their articulated goals for the elimination of bias and the appearance of bias. If the Court were to grant the requested injunction, the people of West Virginia - as represented by the Defendant - would be deprived of the power to prevent the indirect, but not so subtle, contribution of things of value to political candidates for public office in the next general election of this state.

C. Likelihood of Success on the Merits.

The Plaintiffs have claimed, and have citing some language from federal court decisions to suggest, that this case must be decided solely as a matter of law and that legal precedents overwhelmingly support their position. However, this is not solely a matter of law. When a court considers the possible impact of state laws upon the expression of free speech, the Court must consider whether the challenged law furthers a compelling interest and is narrowly tailored to achieve that interest. In order to make that determination, the Court may weigh the individual circumstances behind each challenged law.

In this case, the background giving rise to the amendments to the state law and the effects to be achieved are as much questions of fact as the structure of the law itself. The decision in the *Caperton* case, *supra*, helps to identify the compelling interest of the State. The resulting impact of those events must be examined to evaluate the appropriate nature of the state's response.

When that impact is considered, the State's effort to regulate corrupting conduct represents a rational, tailored approach while permitting the freedom of expression in a way that is independent of the content of that expression. Because the State's approach is rational and even-handed, it should be sustained as a valid act of the people to control their own government.

D. There is a Substantial Public Interest in Fair and Uncorrupted Government Processes.

As noted above, the *Caperton* decision recognized that there is a "serious risk of actual bias - based on objective and reasonable perceptions" arising from the injection of huge amounts of money into a political campaign by a person who had a clear interest in matters to be decided by the winner of that election. In the case of *Buckley v. Valeo*, *supra*, and several following decisions, federal courts have recognized that corruption or the appearance of corruption, is a public interest powerful and significant enough to justify limited, closely-tailored regulations of speech. The appearance of corruption is sufficient in itself.

In the *Caperton* opinion, the Supreme Court acknowledged that there was no objective evidence of actual bias on the part of Justice Benjamin, 556 U.S. at 882 ("We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias"). The Court also declined to find whether the contributions in question had any actual effect on the outcome of the election, saying that this was not the appropriate test, 556 U.S. at 885. In this decision, the United States Supreme Court articulated that the bias of an elected official, whether actual or reasonably perceived, was an important public interest adversely affecting the constitutional principle of due process of law.

In the case before this Court, the Defendant respectfully asserts that the serious risk of improper bias generated from the grant of a thing of value to an elected official is an important public interest to be served by limited regulation campaign financing. Indeed, this bias is what the public perceives to be corruption in office and the corruption of government processes.

When the Supreme Court decided the case of *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), the majority opinion acknowledged that arguments had been presented citing the facts in the *Caperton* case, but that Court abruptly dismissed this comparison by distinguishing that case's foundation upon due process right of a litigant as opposed to the free speech rights of an entity prevented from publishing any commentary in the course of an election, 130 S.Ct. at 910. By focusing on the narrow issue of recusal presented in the *Caperton* case, the *Citizens United* majority did not consider the impact of perceived bias, viz. corruption, across all elected offices.

Recusal of a judge or justice on an individual case may be the appropriate remedy where the elected official (the judge) only has the capacity to influence that one case involving a campaign contributor. It is not sufficient, though, to address the actions of legislators, executive officers, and elected local government functionaries, who may have to act in many ways at many different times upon matters that affect someone known to have contributed to that official's election. Such officials may encounter issues on a daily basis involving a contributor, or multiple contributors, and recusal is not an effective or reasonable option.

There are many expressions of West Virginia law prohibiting an officer from receiving a thing of value from a member of the public, *see e.g.* W. VA. CODE §6B-2-5 (prohibiting the use of public office for private gain) and §61-5A-6 (prohibiting gifts or gratuities to public officers). The goal of these laws is to prevent the officials from using their offices to obtain things of value and to prevent the substantial risk trading the service of that office for such reward. The risk of abuse is so great that the West Virginia Code prohibits this conduct even where the official, or potential official, may not even have the power to grant the favors sought, W. VA. CODE §61-5A-8.

West Virginia's law creates a uniform limit, for all persons, on contributions for the purpose of independent expenditures in support of, or opposition to, the election of a candidate for public office. This law recognizes that contributions to place a candidate in elected office are also 'things of value' that may be traded or called upon to influence an official's conduct in office. Contributing to the election of a political candidate may be a form of speech, but it is also an act that may improperly alter or degrade the fair and open processes of good government. WEST VIRGINIA CODE §3-8-12, and the parallel regulation promulgated by the West Virginia Secretary of State, provide a uniform frame within which all members of the public may freely express support of, or opposition to, any candidate without regard to the choice of the candidate or the content of the message. This represents a reasonable measure to limit the improper conduct - pursuing bias and official favors - while preserving the freedom of expression.

CONCLUSION

Because of the substantial interest of the people of West Virginia in having a government of officials who are free from taint, or traded biases, the Court should not enjoin the operation of West Virginia's laws tailored to reduce those anti-democratic results.

Respectfully submitted,
NATALIE E. TENNANT,
In her official capacity as
SECRETARY OF STATE OF
THE STATE OF WEST VIRGINIA,
and member of the WEST VIRGINIA
STATE ELECTION COMMISSION,

By counsel

DARREL V. McGRAW, Jr.,
ATTORNEY GENERAL

/s/ Doren Burrell

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that I have, on this 16th day of July, 2012, electronically filed the foregoing "Memorandum of Natalie E. Tennant, West Virginia Secretary of State, in Opposition to Preliminary Injunction" with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel:

Allen R. Prunty
W. Bradley Sorrels
Counsel for the Plaintiffs

I further certify that I have also served a true copy of the foregoing document upon the Defendant, Scott Ash, Prosecuting Attorney of Mercer County, West Virginia, by depositing a true copy thereof in the United States Mail, with first class postage prepaid, on this 16th day of July, 2012, addressed as follows:

Scott Ash, Esquire
Prosecuting Attorney of Mercer County
120 Scott Street, Suite 200
Princeton, WV 24740

/s/ *Doren Burrell*